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No. 71-605

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

AARON HENRY, ET AL. ..... Petitioners

V.

CLAIBORNE HARDWARE CO., ET AL. Respondents

RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 71-685

AARON HENRY, ET AL. Petitioners

V.

CLAIBORNE HARDWARE CO., ET AL. Respondents

RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pursuant to the direction of the Court the Respondents file this their response in opposition to the Petition For a Writ of Certiorari in the above entitled and numbered case.[1]

OPINIONS BELOW

Respondents adopt the matters set forth in the petition under this heading.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

1. Whether or not the Circuit Court of Appeals for the Fifth Circuit was correct in holding that there is no

[1] Letter to counsel for respondents from Michael Rodak, Jr., Chief Deputy Clerk, dated January 12, 1972; application for extension of time to file response granted to March 3, 1972, by letter dated February 11, 1972, from Rodak.

"state action" to be found in the mere filing of a private civil tort action in state court; and in directing that the order of the district court, enjoining the prosecution of the pending state court civil action, should be vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction.

STATEMENT

A. The Underlying Facts

Early in 1966 certain black citizens living in the southwestern part of Mississippi were engaged in a dispute with the officials of the town of Port Gibson and Claiborne County, Mississippi, concerning some practices of the officials which were considered by the group to be racially discriminatory. Beginning about April 1, 1966, and regularly thereafter, the group met in a church in Port Gibson. At the initial meeting, the individuals composing the group entered into an agreement to boycott all business establishments owned and operated by white citizens in the county. The preconceived plan and design was to bring economic pressure on the white business operators to compel them in turn to insist that the public officials accede to the demands of the black citizens group. At the outset the black citizens had no primary dispute with the white business operators.

Between 1966 and the middle of 1969, the black citizens group succeeded in securing certain concessions from the officials of the county and town, including the appointment of a black law enforcement officer. The pressure of the boycott during this period varied in the degree of intensity and effectiveness.

In the summer of 1969, a black policeman on the Port Gibson police force killed a black man. The emotions of

the black community were greatly agitated by the incident. The black citizens group demanded that the black policeman be fired and punished. The officials of Port Gibson refused, stating that an investigation of the incident revealed that the black policeman had not acted improperly.

The black citizens group responded by intensifying the boycott of all white owned and operated business establishments in Claiborne County, with some few exceptions.

During the entire period the black citizens group employed violent tactics which had the effect of coercing the customers and prospective customers, against their will, to cease trading with the white merchants. The tactics employed included: the infliction of physical injury on and property damage to the customers; threatening physical injury; intimidation of customers and putting them in fear of injury; branding black customers as traitors; using abusive and insulting language toward the black customers. The black citizens group sent mass pickets into the streets and sidewalks of Port Gibson; made speeches against trading with the white merchants; stationed guards in the vicinity of the business establishments of the white merchants and there physically stopped the customers from entering the premises; villified, slandered and abused black customers who did not agree to cease trading with the white merchants; physically attacked and beat certain black customers and destroyed their property. By the late summer and early fall of 1969, a reign of terror, fear and violence existed in Claiborne County. The white business establishments were caused to suffer great and irreparable harm and damage in the loss of income, profits and good will.

B. The State Court Proceedings

Twenty-three individual and corporate complainants, white owners and operators of the boycotted Port Gibson business establishments, filed a verified bill of complaint in the Chancery Court of the First Judicial District of Hinds County, Mississippi, on October 31, 1969. The defendants in the state court suit were: (1) the National Association for the Advancement of Colored People (NAACP), a New York Corporation; (2) Mississippi Action For Progress, Inc. (MAP), a non-profit Mississippi corporation; (3) 159 individuals; and (4) 53 Mississippi banking institutions.

The state court suit sought injunctive relief and adequa compensation for: (1) the wrongful civil conspiracy; (2) the common law secondary boycott;[2] the common law tort of interference with a business relationship; and (4) the restraint of trade.[3]

The ministerial act of issuing the summons[4] commanding the sheriff of the proper county to summon the defendants to appear and answer on the return day was performed by the Hinds County Chancery Clerk.

B. The Federal Court Proceedings.

Respondents adopt by reference the statement of the proceedings in the federal court as set forth in the

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[2] Petitioners mistakenly assert at page 7 of their petition that the suit was based in part on "the state 'secondary boycott' statute, Miss. Code § 2059.3 (Supp.1971) . . ." An examination of the state court Bill of Complaint, reproduced here in a Supplemental Appendix, will reveal that the basis for that portion of the equity action was based on the Mississippi common law rather than the newly enacted state statute.

[3] Miss. Code §§ 1088, 1089, and 1092.

[4] Miss. Code § 1845

A summons shall not issue in any case, at law or in chancery until the declaration, bill, petition, or other pleading beginning the cause shall be filed. The process to bring in defendants, at law and in chancery, shall be a summons, and it shall command the officer to summon the defendant to appear and answer on the return day.

opinion[5] of the Circuit Court of Appeals for the Fifth Circuit.

SUMMARY OF THE ARGUMENT

There is no "state action" to be found in the mere filing of a private tort suit in the state court. The order of the district court of the Northern District of Mississippi, enjoining the prosecution of a civil action in the Mississippi Chancery Court was correctly ordered vacated by the United States Court of Appeals for the Fifth Circuit and the cause remanded to the district court with instructions to dismiss petitioners' amended complaint based on 42 USC §1983 because the federal district court lacked jurisdiction. In providing a forum to determine the rights of the state court parties, Mississippi does not clothe the litigants with the power and authority of the state.

There is no element of state compulsion where the only involvement of Mississippi was in providing a forum to determine the rights of the contending parties. The requisite "state action" under §1983 is not established by the fact that one group of private citizens filed suit against other private citizens seeking equitable relief and damages for: (1) a wrongful civil conspiracy; (2) a state common law secondary boycott; (3) the common law tort of interference with a business relationship; and (4) the restraint of trade. The state court complainants were under no compulsion by any Mississippi statute or custom of the state, having the force of law, to initiate a civil suit in the Mississippi Chancery Court. Mississippi in no way commanded the state court complainants to file suit. Mississippi has no enforced custom of requiring white business operators to file suit

[5] Appendix pp. a81-a89.

against black citizens when the white business persons are damaged by the deliberate and concerted activities of black citizens who were in a primary dispute with the town of Port Gibson and the County of Claiborne over certain practices which the black citizens regarded as racially discriminatory. The state court complainants were not participants in any joint activity with the State of Mississippi, its agents, or any of the political subdivisions of the state or any agents thereof.

The ministerial acts of the chancery court clerk and the various county sheriffs in issuing and serving process are not acts "under color of law." There is no charge that these officials acted in any manner other than that required in the ordinary performance of their duties, and there is likewise no allegation that the clerk and sheriffs conspired with the state court complainants. There is no showing of a clear, intentional or purposeful discrimination on the part of the state officers or purposeful discriminatory administration of a state statute, fair on its face. The Mississippi court has entered "no order in judgment" in which the power of Mississippi is involved. By holding its courts open to litigation of complaints, regardless of how lacking in substance the suits may prove to be, Mississippi does not clothe litigants with the authority of the state.

The existence of an alleged "chilling effect" in the area of First Amendment rights, by the mere filing of the state court suit, is not and has never been considered a sufficient basis in and of itself for the prohibition of state court action.

The decision of the Fifth Circuit Court of Appeals is not in conflict with any decision of the Supreme Court, nor with the decision of any other United States Circuit Court of Appeals on this point.

There are no constitutional questions properly presented for decision in this case, because no timely appeal was taken by the bank or state court complainants on the validity of the district court's injunction against the attachments. The state court complainants confined their appeal to the validity of the order of the district court entered on June 9, 1970, enjoining the prosecution of the state court action. Neither the validity of the attachment nor the December 15, 1969, preliminary injunction was presented to the Circuit Court of Appeals. Petitioners are not entitled to declaratory judgments regarding the constitutionality of certain Mississippi statutes because the petitioners have no standing in the Supreme Court to challenge the constitutionality of the Mississippi code sections for the reason that no timely appeal was taken by the petitioners from the orders of the district court granting the preliminary injunctions prayed for by the petitioners.

The judgment of the court of appeals for the Fifth Circuit should be affirmed, and the petition for a writ of certiorari should be denied.

REASONS FOR NOT GRANTING THE WRIT

I. The Opinion And Decision Of The Court Of Appeals For The Fifth Circuit Is Not In Conflict With Any Decision Of The Supreme Court.

The Circuit Court of Appeals in its opinion [6] concluded that there was no "state action" to be found in the mere filing of a private tort suit in the state court. On this finding, the order of the district court enjoining the prosecution of the pending state civil action was ordered vacated and the cause remanded with instructions to dismiss the amended complaint for lack of jurisdiction.

[6] Appendix p. a101

The petitioners contend that "In sum, the decision of the Court of Appeals seems irreconcilable with the decision of this Court in *Adickes v. S. H. Kress & Co.*, 398 US 144 (1970), which again put to rest the discredited notion 'that a private person is necessarily immune from liability under §1983 because of the "under color of" law requirement of the statute,' 398 US at 173, n. 44 . . ."

Respondents contend that in providing a forum to determine the rights of the state court parties, Mississippi does not clothe the litigants with the power and authority of the state, and the decision of the Circuit Court of Appeals does not conflict with *Adickes* or *United States v. Price*,[7] inferentially relied on by petitioners, or any other decision of the Supreme Court.

In *Adickes*, Mr. Justice Harlan expressing the view of seven members of the court said:

> ". . . §1 of the Fourteenth Amendment does *not* forbid a private party, *not* acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in *Shelley v. Kraemer*, *supra*, §1 of '(t)hat Amendment erects no shield against merely private conduct however, discriminatory or wrongful.' 334 US, at 13, 92 L Ed, at 1180, 3 ALR 2d 441."[8] (Emphasis supplied)

There is absolutely no element of state compulsion in the Mississippi chancery suit entitled *Claiborne Hardware Company, et al., v. NAACP, et al.*, and the only involvement of the state was in the providing of a forum to determine the rights of the contending parties. The state court complainants were under no state compulsion

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[7] 383 US 787, 16 L Ed 2d 267, 86 S Ct 1152
[8] 398 US at 169; 26 L Ed 2d at 164

by statutory provision or by custom, having the force of law, to initiate a civil action in the Mississippi chancery court. In no manner could it be said that Mississippi commanded the state court complainants to file suit. Likewise, it is plain that the state court complainants were not required to file suit because of a Mississippi enforced custom of requiring white business operators to file suit because they were damaged in their business operations by the deliberate and concerted actions of black citizens.

There is no fact in the record of this case, which suggests that the state court complainants were willing participants in any joint activity with the State of Mississippi or any of its agents in the filing of the state chancery actions as was the situation in *United States v. Price*.[9]

In order to state a cause of action under 42 USC §1983, it is necessary to allege specific facts, (not unsupported general allegations) that the act of the state court complainants in filing the Mississippi chancery action was for the willful purpose of discriminating against the state court defendants.[10] The petitioners failed to set forth in their federal court complaint any such specific [illegible]. The charge is by unsupported general allegations. Making representations to a state official even in a report required by law, is not acting "under color of law" for the reason that such reports are not considered to be done on behalf of the state.[11]

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[9] 383 US at 794, 16 L Ed at 272

[10] *Walker v. Bank of America*, 268 F2d 16, 24, 25 (9CA, 1959) cert den 361 US 903, 4 L Ed 2d 158, 80 S Ct 211, reh den 361 US 941, 4 L Ed 2d 361, 80 S Ct 367.

[11] *Schatte v. International Alliance of Theatrical State Employees and Moving Picture Machine Operators of the United States and Canada, et al.*, (9CA, 1950) 182 F2d 158, 166, 167.

The acts of the deputy chancery clerk in preparing and transmitting the summons to the various deputy sheriffs who served the defendants are not acts "under color of state law" sufficient to form the basis of jurisdiction under §1983.[12] Petitioners do not charge that the deputy clerk and deputy sheriffs acted in any manner other than that required in the ordinary performance of their duties. There are no allegations that these officials conspired with the state court complainants. Discriminatory purposes on the part of clerks and sheriffs in the ordinary performance of their duties cannot be presumed.[13] On the other hand, it can be presumed that the clerk and the sheriffs, in the performance of the ministerial duties, acted in compliance with a state statute, which is fair on its face. In order to bring the action of the clerk and sheriffs within the ambit of §1983, there must be a showing of "clear and intentional discrimination," and the purposeful discriminatory administration of a statute fair on its face.[14] No discriminatory purpose on the part of the clerk and sheriffs is charged or shown by the petitioners.

The 1871 Civil Rights statutes were intended to provide for redress against state action which discriminated against individuals within the jurisdiction of the United States. These statutes do not have the effect of bringing under federal control the protection of private rights against invasion by individuals. The protection of such rights and the redress for such wrongs have been left with the states.[15]

Petitioners assert that when private litigants, whose objectives are to interfere with the rights of other per-

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[12] *Dinwiddie v. Brown*, (5CA, 1956) 230 F2d 465, 469.
[13] *Snowden v. Hughes*, (1943) 321 US 1, 8, 9, 88 L Ed 497, 503; *Terrance v. Florida*, 188 US 519, 520, 47 L Ed 572, 573, 23 S Ct. 402.
[14] 321 US at 8, 9; 88 L Ed at 503.
[15] *Love v. Chandler* (8CA, 1942) 124 F2d 785, 786, 787.

sons, initiate an action in the state court to attain that end, such litigants are "supported by the full panoply of state power," and it cannot be said that the act of initiating the suit is free of state involvement. The petitioners cite *Shelley v. Kraemer*[16] in support of the contention. Only in the subjective consciousness of the petitioners is there any evidence that the objectives of the respondents in filing the state court suit was to interfere with the rights of the petitioners.

Judge Hays, speaking for the Court of Appeals for the Second Circuit in *Stevens v. Frick*,[17] holds that Pennsylvania, by providing a forum for *Frick*, does not establish the requisite state action[18] under § 1983. The court points out that the state judicial action involvement in *Shelley* is readily distinguishable from the facts in the *Stevens* case. In *Stevens*, as in this case, "... no order or judgment has been entered under which the power of the state is involved ... Thus far, Pennsylvania has merely provided a forum to determine the rights of the parties. Both logic and precedent suggest that merely by holding its courts open to litigation of complaints, regardless of how baseless they eventually prove to be, Pennsylvania does not clothe persons who use its judicial processes with the authority of the state in the sense that *Stevens* suggests. See *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944, 69 S. Ct. 810, 93 L. Ed. 1101 (1949); *Skolnick v. Martin*, 317 F.2d 855, 857 (7th Cir.), cert. denied, 375 U.S. 908, 84 S. Ct. 199, 11 L. Ed. 2d 146 (1963); *Skolnick v. Spolar*, 317 F.2d 857 (7th Cir.), cert. denied, 375 U.S. 904, 84 S. Ct. 195, 11 L. Ed. 2d 145 (1963)."

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[16] 334 US 1, 68 S Ct 836, 92 L Ed 1161 (1948)
[17] 372 F2d 378 (1967)
[18] Id. at p. 381

The fact that the petitioners "feel inhibited", even if true, is not "sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal law suit to stop . . . a state court is a serious matter."[19]

In *Younger* this court said the national policy forbidding federal courts to enjoin pending state court proceedings is violated by the issuance of an injunction where the defendant has an opportunity to raise his defenses in the state court.[20] The petitioners contend that the filing of the suit has a "chilling effect on their First Amendment Rights." Again in *Younger*, this court said: "... the existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis in and of itself for prohibiting state action."[21]

Also in *Younger* the Supreme Court said: ". . . we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state . . . prosecutions."[22]

Petitioners contend that the decision of the Court of Appeals for the Fifth Circuit in *Henry, et als, v. Claiborne Hardware Co., et al.*, is in conflict with *New York Times v. Sullivan*.[23] The Fifth Circuit disposed of this contention by quoting from the opinion of this court in the *New York Times* case, wherein it was said that ". . . The test is not the form in which state power has been applied, but whatever the form, whether such power has

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[19] *Younger v. Harris* (1971) 401 US 37, 42, 27 L Ed 2d 669, 674, 675, 91 S Ct 746.
[20] 401 US at p. 40, 41, 27 L Ed 2d at 670, 673, 674.
[21] 401 US at p. 51, 27 L Ed 2d at p. 679.
[22] 401 US at p. 53, 27 L Ed 2d at p. 681, 91 S Ct 746.
[23] 376 US 254, 11 L Ed 2d 686, 84 S Ct 710 (March 9, 1964)

in fact been exercised."[24] The private litigants in this case did not exercise state power, and the *New York Times* case is not applicable.

II. There Is No Conflict Among The Circuits With The Decision Of The Fifth Circuit Court Of Appeals In This Case.

The decision of the Fifth Circuit Court of Appeals in this case is fully in accord with the decisions of the other circuits where the issue of "state action" has been squarely presented. Petitioners make no allegations in the petition that the decision in this case is in conflict with other circuits where the precise issue of the presence of "state action" in the mere filing of a law suit by private parties against other private parties was considered.

The opinion of the Fifth Circuit in this case states:[25]

"...there is a long line of cases which conclude that a state, by merely holding its courts open to litigation of complaints, does not clothe the persons who use its judicial processes with the authority of the state. See *Skolnick v. Martin*, 7th Cir., 317 F.2d 853, cert. denied, 375 U.S. 908, 84 S. Ct. 199 (1963); *Skolnick v. Spolar*, 7th Cir., 317 F.2d 857, cert. denied, 375 U.S. 904, 84 S. Ct. 195 (1963); *Moffett v. Commerce Trust Co.*, 8th Cir., 187 F.2d 242, cert. denied, 342 U.S. 718, 72 S. Ct. 32 (1951); *Campo v. Niemeyer*, 7th Cir. 1950, 182 F.2d 115; *Swift v. Fourth Nat'l Bank*, M.D. Ga. 1962, 205 F. Supp. 563; *Bottone v. Lindsley*, 10th Cir. 1948, 170 F.2d 705, cert. denied, 336 U.S. 944, 69 S. Ct. 810 (1949). See also *Jones v. Jones*, 7th Cir. 1969, 410 F.2d 365, cert. denied, 396 U.S. 1013, 90 S. Ct. 547 (1970); *Rhodes v. Meyer*, 8th Cir., 334 F.2d 709, cert.

[24] Appendix a91, a92; 376 US at 265, 84 S Ct 718
[25] Appendix a93.

denied, 379 U.S. 915, 85 S. Ct. 263 (1964); *Sarelas v. Porikos*, 7th Cir. 1963, 320 F.2d 827; *Waldrop v. Ross*, W.D. Pa. 1970, 319 F. Supp. 1299; *Drexler v. Walters*, D. Minn. 1968, 290 F. Supp. 150; and *Pritt v. Johnson*, M.D. Pa. 1967, 264 F. Supp. 167 (holding that attorneys who participate in litigation are not acting under color of state law within the civil rights statute). The leading case on this question, which presents a fact pattern very similar to the case at hand, seems to be *Stevens v. Frick*, 2d Cir., 372 F.2d 378, cert. denied, 387 U.S. 920, 87 S. Ct. 2034 (1967) . . ."

The Second Circuit, in *Stevens v. Frick*,[26] cites three cases from the Tenth and Seventh Circuits holding, as has the Fifth Circuit in this case, that a state does not clothe persons who use the judicial processes with the authority of the state. Petitioners have cited no case in any circuit on this point which is in conflict with the opinion in this case.

III. There Are No Constitutional Questions Properly Presented In This Case.

At the outset, the Court of Appeals for the Fifth Circuit took great pains to outline in its opinion "a clear picture of what transpired" in the district court and to state "what is and what is not raised in this interlocutory appeal, (and this) is essential to an understanding of our disposition of this case."[27]

The Fifth Circuit Court of Appeals outlined the ". . . Facts and Procedural History."[28] No appeal was taken either by the banks or state court complainants from the interlocutory injunction of December 15, 1969. The court

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[26] 372 F2d at p. 381.
[27] Appendix, pp. a75, a76.
[28] Id. pp. a76-a89.

said that consideration of the validity of the "December 15 interlocutory injunction against the attachments" might be within the scope of its reviewing powers; however, "we decline to do so for several reasons." The court then states the reasons for limiting the appeal, and said: "... the state court complainants here have confined their appeal to questioning the validity of a subsequent order of the court entered on June 9, 1970..."[29]

The court of appeals stated that state court complainants in their appeal from the June 9, 1970, order, also urged that 28 USC §2283, the anti-injunction statute, is an absolute bar to the enjoining of the pending state civil suit; and that petitioners had no absolute right to picket, march, and demonstrate. The appeals court continued, stating: "Because we have decided that federal jurisdiction was lacking to support the cause of action alleged in the complaint, we do not reach the second and third issues."[30] Then the Court said: "... *neither the validity of the attachments below nor the validity of the December 15 preliminary injunction against them is presented to us in this appeal.*" (Emphasis supplied).[31] "The 'state action' which may be found in ministerial acts performed in connection with prejudgment attachments does not necessarily extend to the otherwise wholly private action of a still undecided underlying pending civil suit; in the facts of this case, it most certainly does not."[32]

Petitioners, nevertheless, contend that they "... were at least entitled to declaratory judgment regarding the

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[29] Id. pp. a83-a87, fn. 4-10.
[30] Id. p. a84.
[31] Id. p. a98.
[32] Id. p. a101.

constitutionality of state statutes,[33] (and) the Court of Appeals should have remanded the case to the District Court for further proceedings, not with instructions 'to dismiss the amended complaint for lack of jurisdiction.' "[34]

Respondents contend, as a matter of law, that since the issues of the constitutionality of the Mississippi statutes and the effect of the attachment proceedings were neither raised before nor considered by the Court of Appeals for the Fifth Circuit the Supreme Court will not ordinarily consider such issues.[35]

The petitioners have no standing in the Supreme Court to challenge the constitutionality of the hereinbefore set forth Mississippi Code sections for the reason that no timely appeal was taken by the petitioners from the or-

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[33] Presumably, petitioners are referring to Mississippi Code, 1942, §§1088, 1089, and 1092 (state anti-trust statutes Appendix, pp. a2-a6; a77-a79, fn. 2); 2059.3 (Conspiracy—unlawful restraint of trade—civil liability, Appendix, pp. a1-a2 (1971), (this statute was not utilized by the state court complainants in their suit in the Mississippi Chancery Court); 2729 (Non-residents—absent or absconding debtors, Appendix, p. a33, fn. 2); 2730 (Attachment against nonresidents—how effects or indebtedness bound, Appendix, p. a33, a34, fn. 2); Recompiled 1956, 1957.

[34] Petition p. 29.

[35] *Adickes v. Kress & Co.*, 398 US 144, 147, 26 L Ed 2d 142, 148, 90 S Ct 1598, fn. 2; *Lawn v. United States*, 355 US 339, 362-363, n. 16, 2 L Ed 2d 321, 337, 78 S Ct 311 (1958); *Husty v. United States*, 282 US 694, 701-702, 75 L Ed 629, 632, 633, 51 S Ct 240 (1931); *Duignan v. United States* 274 US 195, 200, 71 L Ed 996, 1001, 47 S Ct 566 (1927). The United States Supreme Court will not consider questions which were not considered by the courts below. *Hines Yellow Pine Trustees v. Martin*, 268 US 458, 69 L Ed 1050, 45 S Ct 543. In reviewing a decision of the court below, the Supreme Court will not pass in a question not considered below. *Mabee v. White Plains Pub. Co.* 327 US 178, 90 L Ed 607, 66 S Ct 511. A question raised for the first time in the United States Supreme Court will not be considered by it; *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 US 692, 73 L Ed 903. The Supreme Court will not consider a point first raised by the petition for certiorari; *Helvering v. Minnesota Tea Co.* 296 US 378, 80 L Ed 284, 56 S Ct 269. The Supreme Court will not pass on a point not considered by the Circuit Court of Appeals; *Zellerbach Paper Co. v. Helvering* 293 US 172, 79 L Ed 264, 55 S Ct 127.

ders of the district court granting the preliminary injunctions prayed for by the petitioners.

A review of the proceedings in the district court is essential for coherent presentation of this point. The original complaint of this suit was filed on November 7, 1969, by Aaron Henry, president of both the Mississippi State Conference and the Coahoma Branch of the NAACP. In the original complaint, plaintiff charged that their operational funds had been frozen without notice and hearing. They sought "to enjoin (the) attachment of property belonging to them made without compliance with fundamental constitutional guarantees." The district court held a hearing on the original plaintiff's motion for a temporary restraining order on November 17, 1969, at which time the defendant bank[36] appeared and moved, ore tenus, to have the state court complainants made parties to the proceedings on grounds that the state court complainants claimed an interest in the contested funds. The district court granted the motion of the bank as well as the original plaintiff's motion for a temporary restraining order, and set December 1, 1969, for a hearing on the motion for a preliminary injunction. At the December 1 hearing, the state court complainants appeared and contested the motion. At the conclusion of this hearing, the district judge announced that he would grant the motion for a preliminary injunction. On December 15, 1969, the district court entered an order directing the defendant banks "to release all funds held by them pursuant to the writs of attachment . . . upon posting by plaintiffs . . . of a bond in the amount of 110% of (the) funds." The state court complainants were prohibited from subjecting or causing to be subjected in any way funds of the original plaintiffs deposited in the

[36] First National Bank of Clarksdale.

defendant banks to attachment or other process which would cause the original plaintiffs to be deprived of the use of their funds.

The Fifth Circuit Court of Appeals found that no appeal was taken by either the banks or the state court complainants from the interlocutory injunction of December 15, 1969. The time for appeal from such order or the request for an interlocutory appeal from such order had long since passed.[37]

Petitioners now ask the Supreme Court to rule that Mississippi Code §§2059.3 (the conspiracy statute in unlawful restraint of trade—civil liability) and 2729 and 2730 (the non-resident Mississippi chancery attachment statutes) violate their constitutional rights. Although ample opportunity was afforded petitioners to raise this question in the district court, and in the court of appeals they failed so to do.

It is a fundamental rule of law that failure to cross appeal, first to the Court of Appeals for the Fifth Circuit, from the adverse part of the decision of the district court, would preclude subsequent review by the United States Supreme Court.[38] The failure to cross appeal the adverse part of the decision of the district court now precludes the review of these questions by the Supreme Court.[39]

In *Penfield Company v. Securities & Exchange Com.*, certiorari was granted to one who had been held in contempt. The United States Supreme Court held that the contemnor was precluded at the certiorari level from renewing objections to the merits of the judgment of

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[37] Appendix a82, a88 and a84.
[38] 32 Am. Jur. 2d, Federal Practice and Procedure, Section 301 at pages 773, 774.
[39] Annotation 1 L Ed 2d 1829, 1830.

contempt since these were considered and determined against him by the district court, and he did not appeal from that adverse judgment.[40]

In *Harrison v. Perea*,[41] the trial court entered a decree in favor of the complainant for an accounting of property and assets of the estate of a decedent; found the amount due from defendant to complainant, and decreed its payment. The defendant, alone, appealed to the Supreme Court of the territory which affirmed the decree. The defendant then appealed to the United States Supreme Court, and the complainant cross appealed. In the cross appeal the complainant attempted a modification of the judgment of the lower court with regard to the parties to the distribution. The United States Supreme Court refused to consider the question, pointing out that the complainant, not having appealed from the trial court, and the appellate court below having simply affirmed the provision in question, the defendant's appeal from the latter decree did not bring up this question for review, and that all that the complainant could claim in the court below was the affirmance of the decree, because he could not be heard to ask for its modification or reversal. When the court below affirmed the pertinent provision of the decree, the complainant's cross appeal would not bring the propriety of the provision for distribution before the United States Supreme Court. The same ruling was made as to the complainant, upon his cross appeal, asking for a modification of the decree to secure a higher rate of interest from the defendant.

A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he

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[40] 330 US 585, 91 L Ed 1117, 67 S Ct 918, Reh Den 331 US 865, 91 L Ed 1870, 67 S Ct 1301 (1947).

[41] 168 US 311, 42 L Ed 478, 18 S Ct 129 (1897).

may not attack it even on the grounds asserted in the court below or in an effort to have the United States Supreme Court reverse it, when he himself has not sought review of the whole judgment, or that portion which he considers adverse to him. [42]

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[42] *Letulle v. Scofield* (1939), 308 US 415, 421, 422, 84 L Ed 355, 360, 361, 60 S Ct 313; *Helvering v. Pfeiffer* (1937), 302 US 247, 250, 251, 82 L Ed 231, 233, 234, 58 S Ct 159.

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be affirmed, and the petition for a writ of certiorari should be denied.

Dated: March ....., 1972.

Respectfully submitted,

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